88-460

Supreme Court, U.S.
FILED
AUG 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT B. PAYNE, Appellant

VS.

FRED G. GANNON, Appellee

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH COURT OF APPEALS OF TEXAS AND THE SUPREME COURT OF TEXAS.

Leonard Wayne Scott
Counsel for Appellant
University Park Station
San Antonio, Texas 78228
(512-436-8180)

August 9, 1988

QUESTION PRESENTED

Whether Rules 5 (e) and (f), Texas Rules of Appellate Procedure, are violative of the Due Process and Equal Protection Clauses of the United States Constitution, by allowing a State to place an arbitrary time limit of ninety days, within which a party may discover that the Clerk of the Court of Appeals has failed to discharge the duty of giving notice of the action of the Court of Appeals in overruling the Appellant's Motion for Rehearing, thereby denying the Appellant the right to timely file an Application for Writ of Error with the Supreme Court of Texas.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT B. PAYNE, Appellant

VS.

FRED G. GANNON, Appellee

ON APPEAL FROM

THE FIFTH COURT OF APPEALS OF TEXAS

AND THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

Robert B. Payne, the Appellant, appeals from the judgment of the Fifth Court of Appeals of Texas dated July 9, 1987, and the final judgment of the Supreme Court of Texas, denying Appellant's Application for Writ of Error for Want of Jurisdiction. The

Texas Supreme Court ruled, without written opinion, by an order dated March 23, 1988, holding, by implication, that Rule 5 (f) Texas Rules of Appellate Procedure, precluded Appellant from filing an Application for Writ of Error with that Court because Appellant did not discover, within ninety days, that the Texas Court of Appeals had overruled Appellant's Motion for Rehearing without notice to Appellant.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, which appears in the appendix hereto, p. 28, infra, was ordered unpublished. The holding in the opinion is immaterial to this appeal, which relates to the failure of the Court of Appeals to give Appellant Notice of the overruling of the Motion

for Rehearing. The Texas Supreme Court, without issuing an opinion, Denied Appellant's Application for Writ of Error for Want of Jurisdiction.

JURISDICTION

On February 12, 1986, the 160th Judicial District Court of Dallas County, Texas, entered Judgment Non Obstante Veridicto for Appellee, Defendant below. That judgment was timely appealed to the Texas Court of Appeals for the Fifth Supreme Judicial District sitting at Dallas, Texas. It handed down an unpublished opinion on July 9, 1987, which appears in the appendix hereto, p.28, infra. Appellant filed a motion for rehearing on July 24, 1987, and an Amended Motion for Rehearing on August 10, 1987. On August 12, 1987, the Court of Appeals wrote that the Amended Motion would be

considered when a response was filed or after ten days. The Court of Appeals overruled Appellant's Original Motion for Rehearing on August 13, 1987, but failed to furnish notice to Appellant or to his attorneys. On December 18, 1987, the Court of Appeals withdrew its mandate and ordered that Appellant's first Motion for Leave to File an Amended Motion for Rehearing would be granted, and allowed the amended motion to be filed. On December 21, 1987, Appellant filed, and the Court of Appeals granted, Appellant's Motion for Leave to File a Second Amended Motion for Rehearing. On January 21, 1988, Appellant's first and second Amended Motions for Rehearing were overruled. On February 22, 1988, Appellant filed an Application for Writ of Error to the Texas Supreme Court. Without written

opinion, this Application was Denied for Want of Jurisdiction on March 23, 1988. A Motion for Rehearing was filed on April 21, 1988. That motion was overruled without written opinion on May 11, 1988.

This appeal is being docked in this Court within 90 Days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1257 (2) & (3).

CONSTITUTIONAL PROVISIONS AND RULES

Fourteenth Amendment, Section 1, United States Constitution:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Rule 5 (e), Texas Rules of Appellate Procedure:

"Notice of Judgment of Appellate Court. When the court of appeals renders judgment or grants or overrules a motion for rehearing, the clerk shall immediately give notice to the parties or their attorneys of record of the disposition made of the cause or of the motion, as the case may be. The notice shall be given by first-class mail and be so marked as to be returnable to the clerk in case of nondelivery."

Rule 5 (f) Texas Rules of Appellate Procedure:

"**No notice of Judgment of Appellate Court.** Notwithstanding any provision of these rules concerning the time for filing a motion for extension of the period for filing a motion for rehearing, application for writ of error, or petition for discretionary review, an extension of such period may be granted by the appellate court in which a motion for extension would properly be filed on sworn motion showing that neither the party desiring to file such motion for rehearing, application for writ of error, or petition for discretionary review nor his attorney had notice or actual knowledge of the judgment or order from which such period began to run before the last day of such period and

stating the earliest date either the party or his attorney received such notice or actual knowledge. Such a motion for extension shall be filed within fifteen days of the date either the party or his attorney first had such notice or actual knowledge, **but in no event more than ninety days after the beginning of such period.** When such a motion is granted, the period in question shall begin to run on the date of granting the motion." [Emphasis added]

RAISING THE FEDERAL QUESTION

The Texas Court of Appeals overruled Appellant's Motion for Rehearing without giving notice of that action. Appellant pointed out to the Court of Appeals that this was in violation of the Due Process and Equal

Protection clauses of the United States Constitution. The Court of Appeals withdrew its mandate, allowed the filing of First and Second Amended Motions for Rehearing, indicating that it had jurisdiction even though the error was not discovered within ninety days as required by Rule 5(f), Texas Rules of Appellate Procedure. It then overruled those Motions for Rehearings without opinion. The Court of Appeals, by implication, considered, and sustained, Appellant's constitutional arguments.

An Application for Writ of Error was filed with the Texas Supreme Court. It was timely filed if the Court of Appeals correctly allowed the filing of the First and Second Amended Motions for Rehearings entered with notice to Appellant. The Texas Supreme Court

denied the application for writ of error for want of jurisdiction, thereby indicating, without written opinion, that Rule 5 (f), Texas Rules of Appellate Procedure, applied and denied the Court of Appeals jurisdiction to correct the error, since the Appellant did not discover the error within ninety days. Appellant, by Motion for Rehearing before the Texas Supreme Court, again pointed out that this procedure violated the Due Process and Equal Protection clauses of the Constitution of the United States, citing such cases as Peralta v Heights Medical Center, Inc, U.S. , 108 S.Ct. 896, L.Ed.2d (1988). The Texas Supreme Court overruled this Motion for Rehearing. It thus considered and expressly rejected this federal constitutional claim.

STATEMENT OF THE CASE

Appellant filed his motion for rehearing on July 24, 1987. An Amended Motion for Rehearing was filed on August 10, 1987, and a Motion for Leave to File the Amended Motion for Rehearing was filed on August 12, 1987. The Court of Appeals acknowledged receipt of the Amended Motion, and Leave to File, by a letter dated August 12, 1987, stating that the motion would be considered

> "...when a response is filed or after the expiration of 10 days from the above date [August 12, 1987], whichever comes first. The Court desires a response to the motion."

That letter was the last correspondence received by Appellant , or by counsel of record representing Appellant, until

December 16, 1987, when counsel called the Clerk's office of the Court of Appeals, to inquire of the status of the case.

Apparently, the Court of Appeals overruled the Appellant's Original Motion for Rehearing on August 13, 1987, but failed to furnish notice to Appellant, or Appellant's attorneys'-of-record. Since the case is one of complexity and importance, Appellant and Appellant's attorneys did not expect action on the motions for rehearing for several months, and were not surprised by the silence of the Court Appeals during the period of time involved.

According to the affidavit of Myra Sands, Deputy Clerk of the Court of Appeals,[1] and the records of the Court

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of Appeals, no notice was given Appellant, or his attorneys-of-record (Scott and Edmondson). The affidavits of Appellant Payne, and attorneys Scott, Edmondson, and Klein also reflect that neither Appellant, nor his attorneys, were given actual or written notice of the Court of Appeal's action on August 13, 1987. This is not contested by Respondent.

On December 18, 1987, the Court of Appeals withdrew its mandate and ordered that Appellant's first Motion for Leave to File an Amended Motion for Rehearing be granted, and allowed the Amended Motion to be filed. The Court of Appeals then correctly withdrew its mandate, and recognized that the order overruling the Original Motion for New

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1. It is now undisputed that notice was not given, therefore the affidavits have not been brought forward.

Trial was interlocutory, since it did not dispose of the Appellant's Motion for Leave to File the Amended Motion for Rehearing, and the Second Amended Motion for Rehearing. The case, therefore, remained pending before the Court. On December 21, 1987, the Appellant filed, and the Court of Appeals granted, Appellant's Motion for Leave to File a Second Amended Motion for Rehearing, and an Extension of Time to File a Second Amended Motion for Rehearing.

On January 21, 1988, Appellant's first and second Amended Motions for Rehearing were overruled. On February 22, 1988, Appellant filed his Application for Writ of Error in the Court of Appeals. The application was timely filed, if computed from the January 21, 1988 date. On February 22,

1988, Appellant filed an Application for Writ of Error to the Texas Supreme Court. Without written opinion, this Application was Denied for Want of Jurisdiction on March 23, 1988. A Motion for Rehearing was filed on April 21, 1988. That motion was overruled without written opinion on May 11, 1988.

THE QUESTION WAS SUBSTANTIAL

The interpretation by the Supreme Court of Texas, of Texas Appellate Rule 5(e), violates the Fourteenth Amendment of the Constitution of the United States by denying a party the right of review by writ of error when the State Court of Appeals fails to notify the party of its action, and the party fails to discover the action within ninety days of the undisclosed court action.

The Texas Supreme Court dismissed the Application for want of jurisdiction.[2] Since Appellant filed a jurisdictional statement (Application for Writ of Error, pp 3-7), and since there is no claim that the Court of Appeals' jurisdiction was final, it must be presumed that the Texas Supreme Court found that the Application for Writ of Error was not timely filed within thirty days of the overruling of the motion for rehearing in the Court of Appeals, as required for an Application for Writ of Error to the Texas Supreme Court. Rule 130 (b), Texas Rules of Appellate Procedure. To

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[2] Rule 133, Texas Rules of Appellate Procedure provides in part: "In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

draw this conclusion, the Texas Supreme Court must have accepted the August 13, 1987 order, overruling the Original Motion for Rehearing as Final, and must have concluded that Tex.App.Proc.Rule 5(f)[3] supercedes the Court of Appeals plenary and inherent power. In doing this, the Texas Supreme Court erred.

There is no question that the Court of Appeals did not comply with Tex. App. Proc. Rule 5(e),[4] which requires that the clerk immediately give, by first-class mail, notice to the parties, or their attorneys, when the court of appeals renders judgment, or grants, or overrules a motion for rehearing. Upon learning of this error, Appellant, and the Court of

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[3] Hereinafter Rule 5(f)

[4] Hereinafter Rule 5(e)

Appeals, did everything which could be thought of to undo the error.

The only argument which can support the denial of Texas Supreme Court jurisdiction, is that Appellant did not learn of the error within the ninety days provided by Rule 5(f), which authorizes an extension when there is a lack of notice, "but in no event more than ninety days after the beginning of the period."

Clearly, "A fundamental requirement of due process is 'the opportunity to be heard.'" Armstrong v Manzo, 380 U.S. 545, 551, 85 S.Ct.1187, 1191, 14 L.Ed.2d 866 (1965). Yet, by both Rule 5 (f) and by case authority, the Texas Supreme Court has held that the right to file an Application for Writ of Error will be lost if the Court of Appeals acts, fails to give the

appellant notice, and the appellant fails to discover the error of the Court of Appeals within ninety days. See: Henningsmeyer v First State Bank, 109 Tex. 116, 195 S.W. 1137 (1917), where a divided Texas Supreme Court held that where the appellant did not learn of the overruling of the motion for rehearing in time to file an application for writ of error, the Court of Appeals could not extend the time for filing the application for writ of error by merely setting aside the prior order. This Court's holding in Henningsmeyer, and its limited effort at modifying the Henningsmeyer rule, in Rule 5(f), do not accomplish the requirements of due process, or equal protection. An order, such as the order of the Court of Appeals on August 13, 1987, "entered without

notice or service is constitutionally infirm." Peralta v Heights Medical Center, Inc, U.S. , 108 S.Ct. 896, 899, L.Ed.2d (1988). Action taken by a court, without the required legal notice to the affected party, is void. See: Peralta, supra.

Appellant has done nothing wrong in this case. He followed the law, as it was written, in filing the Motion for Rehearing, and the Amended Motion for Rehearing. He relied upon the Court of Appeals to notify him of its action, as that Court was required to do by law. He relied upon that Court to consider his tendered amended motion for rehearing, as it said it would. Surely, he is just as entitled to relief, by being allowed to have his appeal considered, as was Peralta to answer, without having to show a

meritorious defense. Appellant does not require relief from showing a defense. He simply want's to present his legal questions (and they are substantial) to the Texas Supreme Court.

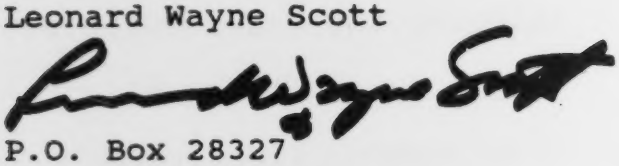
The proper result is to recognize that when a Court of Appeals fails to give a party notice of its actions on rehearing, as it is required to do by law, the injured party should be allowed to proceed upon discovery of the error, as though the error had not occurred. Peralta, supra. It then behooves the opponent to see that actual notice is given to the unwary party.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Leonard Wayne Scott



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University Park Station

San Antonio, Texas 78228

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APPENDIX

July 9, 1987 Opinion of the Texas Court of Appeals:

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

NO. 05-86-00562-CV

ROBERT B. PAYNE — FROM A DISTRICT COURT

APPELLANT

v.

FRED G. GANNON

APPELLEE — OF DALLAS COUNTY

BEFORE JUSTICES STEPHENS, HECHT AND THOMAS

OPINION BY JUSTICE STEPHENS

JULY 9, 1987

The litigation in this case has been long and arduous. We conclude, as argued by appellee, that the doctrine

of collateral estoppel is applicable, and, accordingly, we affirm the judgment of the trial court.

The parties friendship dates back to college days. They have, since their friendship began, engaged in numerous business undertakings together. The matter under consideration in this case began in the early 1960's, when Fred G. Gannon and Robert B. Payne agreed to share equally in an oil and gas lease in Alberta, Canada, known as the Hambly Lease. In 1965 Gannon contracted with Paddon Hughes Development Co. to purchase and to share 50-50 in the Hambly Lease. Embodied in this agreement was a "prior right to purchase" granted Paddon Hughes by Gannon of any portion of Gannon's interest that he desired to sell to a third party. Paddon Hughes

was unaware of Payne's partnership with Gannon, and Payne was unaware of the right to purchase provision. When Payne learned of Paddon Hughes' prior right of purchase, he sought to have Gannon clear the matter with Paddon Hughes by declaration that the right of purchase did not apply to Payne's partial interest. Gannon refused to clarify this matter and held the lease interest solely in his name, but made full accounting to Payne and remitted Payne his portion of the profits. At some point in time, Gannon disclosed to Payne that another firm, known as Voelker and Carstairs, held an ownership interest in the lease which reduced Gannon and Payne's share to 35% of the lease. There apparently was no disagreement between Gannon and Payne as to the Voelker and Carstairs

interest. When this investment began to produce profits, Gannon received 35% of the net revenues and promptly remitted one-half to Payne and in turn retained his 17.5% of the net revenues.

A dispute arose between Gannon and Payne in 1972, resulting in Gannon's decreasing Payne's remittance to 15% and keeping 20% for himself. Finally, in 1972, Gannon stopped remitting any share to Payne, and Payne sued Gannon in Canada. On March 24, 1977, almost two years before the trial in the Canadian suit, Payne made an agreement with Paddon Hughes wherein Paddon Hughes waived any rights it might have in Payne's interest in the Hambly lease in exchange for an agreement that Payne assign to Paddon Hughes up to 2% of the Hambly Lease, conditioned upon Payne being successful in the Canadian

litigation against Gannon. On November 7, 1977, some 8 months after Payne had entered into his agreement with Paddon Hughes, Gannon filed a pleading in the Canadian suit, alleging that the Gannon Payne agreement violated the terms of his agreement with Paddon Hughes, and was, therefore, unenforceable under Canadian law. Payne responded, pleading that his agreement with Gannon did not violate the Gannon Paddon Hughes contract, and that if it did in fact violate the agreement, Paddon Hughes had waived its rights as a result of the March 24, 1977, agreement.

Payne recovered judgment in the Canadian suit against Gannon for his wrongful termination of Payne's production runs from the Hambly lease, and both the trial court and the court

of appeals in Canada ruled that Paddon Hughes had no rights to Payne's interest in the Hambly Lease, regardless of the March 24, 1977, agreement, because Payne's rights were in existence at the time Gannon made his deal with Paddon Hughes.

In the present litigation, Payne seeks to recover from Gannon the 2%, or its value, that he paid to Paddon Hughes to waive its right of first purchase, contending that the agreement with Paddon Hughes was reasonable and necessary to protect him in the Canadian suit, and that Gannon's actions in discontinuing his oil runs were the motivating factor causing him to contract with Paddon Hughes, and thus he is entitled to recover from Gannon.

This brings us to the sole question, irrespective of how it is phrased, in the present suit, of whether Payne is precluded from recovery in this litigation by the prior litigation in Canada. We conclude that he is so precluded.

The fundamental issue is whether Payne has alleged and proven a cause of action against Gannon resulting from Payne's agreement with Paddon Hughes as to its right of purchase. We conclude that the doctrine of collateral estoppel controls the decision in this case. In Bonniwell v Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984), the Texas Supreme Court enunciated the doctrine of collateral estoppel. It is a narrower concept than the broad concept of res judicata. Collateral estoppel precluded the relitigation of

issues that have once been determined by a court of competent jurisdiction, when the same parties in the present litigation were adverse parties in the prior litigation, when the issue was fully determined in the prior litigation, and when the issue was essential to the prior adjudication. The adverse parties in this litigation were adverse parties in the Canadian litigation. The issue of Paddon Hughes' right to purchase Payne's interest in the Hambly Lease was directly determined, and such determination was essential to the judgment rendered by the Canadian court.

We conclude, by applying the doctrine of collateral estoppel, that Payne has failed to plead and prove a valid claim against Gannon.

Accordingly, the judgment of the trial court is affirmed.

/s/ Bill J. Stephens

BILL J. STEPHENS

JUSTICE

DO NOT PUBLISH

TEX. R. APP. P. 90.

86-00562.F/er

December 18, 1987 Order of Court of Appeals Withdrawing Mandate and Granting Leave to File Appellant's Amended Motion for Rehearing:

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

ROBERT B. PAYNE

APPELLANT

v. NO. 05-86-00562-CV

FRED G. GANNON

APPELLEE OF DALLAS COUNTY

ORDER

Upon review of our file, the Court notes that appellant Robert B. Payne filed a motion for leave to file appellant's amended motion for rehearing on August 12, 1987. Appellant's motion for leave was properly before this Court. Tex. R. App. P. 100(e). Thorough inadvertence,

the Clerk of the Court failed to note appellant's motion for leave on the Court's docket, and summarily and improvidently issued the mandate of this Court on October 13, 1987, before appellant's motion for leave was considered. Therefore, the mandate is recalled. The Clerk of the Court is directed to notify the clerk of the trial court and all parties immediately. Tex. R. App. P. 86(e).

Appellant's August 12, 1987 motion for leave to file appellant's amended motion for rehearing is GRANTED. Appellant's amended motion for rehearing, tendered to this Court on August 10, 1987, is ORDERED filed as of that date. Any response to appellant's amended motion for rehearing is to be filed within 10 days of the date of this order.

December 18, 1987

Bill J. Stephens

BILL J. STEPHENS

JUSTICE

December 21, 1987 Order of Court of Appeals Granting Leave to File Appellant's December 21, 1987 Second Amended Motion for Rehearing:

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

ROBERT B. PAYNE

APPELLANT

v. NO. 05-86-00562-CV

FRED G. GANNON

APPELLEE OF DALLAS COUNTY

ORDER

Appellant's December 21, 1987 motion to file appellant's amended motion for rehearing is GRANTED. Appellant's amended motion for rehearing, tendered to this Court on December 21, 1987, is ORDERED filed as of that date. Appellant's August 10,

1987 amended motion for rehearing is DEEMED superseded.

Any response to appellant's amended motion for rehearing is to be filed within 10 days of the date of this order.

December 21, 1987

/s/Bill J. Stephens

BILL J. STEPHENS

JUSTICE

January 21, 1988 Order of Court of Appeals Order Overruling Appellant's Second Amended Motion for Rehearing.

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

ROBERT B. PAYNE

APPELLANT

V. NO. 05-86-00562-CV

FRED G. GANNON

APPELLEE OF DALLAS COUNTY

ORDER

It is ORDERED that the Second Amended Motion for Rehearing filed by appellant, Robert B. Payne, is hereby OVERRULED.

JANUARY 21, 1988.

/s/Bill J. Stephens

BILL J. STEPHENS

JUSTICE

April 6, 1988 Order of Texas Supreme Court Dismissing Petitioner's Application for Writ of Error For Want of Jurisdiction

SUPREME COURT OF TEXAS

P.O. BOX 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

April 6, 1988

Mr. Wayne Scott

P. O. Box 28327

University Park Station

San Antonio, TX 78228

Mr. Ron Edmondson

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P. O. Box 837

Corsicana TX 75110

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Kasmir & Krage
2001 Bryan Tower
Suite 2700
Dallas, Texas 75201

Mr. Gerald B. Rickey
Pace, Chandler & Rickey
2720 Fairmont Street
Dallas, TX 75201

RE: Case No. C-7270
Style: ROBERT B. PAYNE
v. FRED G. GANNON

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/Blanca E. Moun

Deputy

May 11, 1988 Order of Texas Supreme Court Overruling Petitioner's Motion for Rehearing of the Application for Writ of Error:

SUPREME COURT OF TEXAS

P.O. BOX 12248

Supreme Court Building

Austin, Texas 78711

Mary M. Wakefield, Clerk

May 11, 1988

Mr. Wayne Scott

P. O. Box 28327

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San Antonio, TX 78228

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Dallas, Texas 75201

Mr. Gerald B. Rickey
Pace, Chandler & Rickey
2720 Fairmont Street
Dallas, TX 75201

RE: Case No. C-7270
Style: ROBERT B. PAYNE
v. FRED G. GANNON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/Blanca E. Moun

Deputy

August 11, 1988 Acknowledgement of Notice of Appeal:

Official Notice From

Supreme Court of Texas

RE: Case No. C-7270

Style: ROBERT B. PAYNE

v. FRED G. GANNON

Notice of Appeal to the United States Supreme Court was received in the Supreme Court of Texas today.

Mary M. Wakefield, Clerk

SUPREME COURT OF TEXAS

P.O. BOX 12248

Supreme Court Building

Austin, Texas 78711

Mail To: Dr. Leonard Wayne Scott

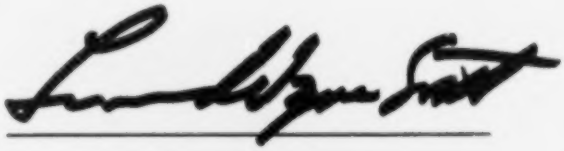
P. O. Box 28327

University Park Station

San Antonio, TX 78228

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing instrument was mailed this 6 th day of September, 1988, by United States mail to Jim Mattox, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711 and to counsel for Appellee: Mr. Gerald Rickey, 2720 Fairmount St, Dallas, Texas 75201, and to Mr. Ben L. Krage, Kasmir, Willingham & Krage, 2001 Bryan Tower, Suite 1300, Dallas, Texas 75201.



Leonard Wayne Scott